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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MITSUBISHI POWER SYSTEMS, INC., Plaintiff and Appellant, v. TEXAS WIND POWER COMPANY et al., Defendants and Respondents.	B192071 (Los Angeles County Super. Ct. No. BC347056)

APPEAL from an order of the Superior Court of Los Angeles County. John P. Shook, Judge. Reversed.

Steptoe & Johnson, Jay E. Smith, Charles G. Cole, and Filiberto Agusti for Plaintiff and Appellant.

Gibson, Dunn & Crutcher, Dean J. Kitchens, and Jeremy W. Stamelman for Defendant and Respondent Wayne Schroeder.

Lerman Pointer & Clarkson, Robert L. Clarkson and Lawrence C. Jones for Defendant and Respondent Heather Otten.

Appellant Mitsubishi Power Systems, Inc. (Mitsubishi) appeals from a trial court order granting respondents Wayne Schroeder (Schroeder) and Heather Otten's (Otten) motions to quash service of summons. We determine that Mitsubishi has shown evidence of sufficient minimum contacts to establish the California court's specific personal jurisdiction over respondents. We therefore reverse the trial court order granting the motions to quash service of summons.

FACTUAL AND PROCEDURAL BACKGROUND

The Parties

This action arises out of a series of agreements between Mitsubishi and Texas Wind Power Company (TWP). Mitsubishi is a Delaware corporation with its principal place of business in Florida; it maintains an office in Newport Beach, California, from which it markets and sells wind turbine generators (WTGs). TWP, a Texas corporation with its principal place of business in Texas, engages in business relating to the construction of wind power projects in Texas and New Mexico. At all relevant times, Otten was the general counsel of TWP and Schroeder was TWP's controller.

The Caprock Project

In the Caprock Project, Mitsubishi sought to engineer and finance a wind farm in New Mexico. The Caprock Project was originally developed by Cielo Wind Power Corporation (Cielo) and Walter Hornaday (Hornaday) through Cielo subsidiaries. The Cielo subsidiaries owned an entity known as Caprock Wind, LP, which in turn owned an entity called Caprock Wind, LLC (Caprock Wind). Cielo was under the control of Hornaday, as are TWP and Texico Wind, LP (Texico).

On August 16, 2004, Mitsubishi and TWP entered into an Engineering, Procurement, and Construction Contract (the EPC Contract) with Caprock Wind, whereby Mitsubishi and TWP agreed to build the Caprock Project for Caprock Wind for $22,750,000. In order to assign their respective responsibilities, Mitsubishi and TWP entered into an Engineering, Procurement and Constructive Performance Agreement (the EPCP Agreement). The EPCP Agreement provided that Mitsubishi would build the WTGs and TWP would assemble and construct the WTGs and the plant.

On September 3, 2004, the Cielo subsidiaries sold Caprock Wind, LP, to Babcock & Brown Caprock GP, LLC, Babcock & Brown Power Operating Partners LLC, and Babcock & Brown Holdings, Inc. (collectively B&B). B&B maintains offices in San Francisco.

On this same date, Mitsubishi provided a construction loan to Caprock Wind in an amount up to $24.3 million. The loan covered the cost of subcontractors and equipment vendors during the Caprock Project's "first phase."

In order to pay the subcontractors and vendors, Mitsubishi, TWP, and Caprock Wind agreed to a specific disbursement protocol (the original protocol). Pursuant to the original protocol, which governed the disbursement of funds from September 2004 through December 2004, the subcontractors would submit invoices for work performed to TWP. TWP would collect the invoices and then submit a payment application to Caprock Wind (in San Francisco), requesting a lump sum payment. Caprock Wind, in turn, would attach those payment applications to disbursement requests and forward them to Mitsubishi (in Newport Beach). Caprock Wind would pay TWP, which was responsible for paying the subcontractors with these funds. Each payment application purported to identify specifically the contractors to be paid and the amount to which each was entitled.

Additionally, every payment application contained a certification representing that (1) the funds requested were for materials and labor provided to date by the subcontractors, and (2) TWP had fully paid all other amounts not included in the current request that it owed to subcontractors for materials and labor. Schroeder was responsible for obtaining invoices from the subcontractors and submitting the payment applications to Caprock Wind. He personally signed each certification. He then sent the certified payment applications to Caprock Wind and e-mailed the payment applications to Mitsubishi. Relying upon these certified payment applications, Mitsubishi released construction loan funds to Caprock Wind, which then disbursed those funds to TWP.

In December 2004, TWP disclosed to Mitsubishi that it would not have sufficient funds from the construction loan to complete the first phase of the Caprock Project. After

visiting the Caprock Project site and participating in various meetings, Schroeder advised Hornaday that TWP would need at least another $5 million to complete the Caprock Project.

On December 13, 2004, Schroeder met with Mitsubishi officials at Mitsubishi's offices in Newport Beach to discuss the lack of funds and "cost overrun" situation. Also during that meeting, Schroeder participated in discussions concerning $5.2 million ostensibly needed to complete the Caprock Project.

On December 14, 2004, Schroeder e-mailed Mitsubishi offices in Newport Beach a spreadsheet detailing the $5.2 million amount that was purportedly needed to complete the Caprock Project and pay all project subcontractors.

Based in part upon Schroeder's representations[1] at the December 13, 2004, meeting, and upon the spreadsheet that Schroeder e-mailed to Mitsubishi the following day, Mitsubishi agreed to lend more money to TWP. When Mitsubishi asked for security for these additional funds, TWP offered as collateral the proceeds from a different project, known as the Texico Wind Ranch. On December 30, 2004, Otten provided Mitsubishi with a written legal opinion representing that TWP had the right and authority to transfer to Mitsubishi a collateral assignment and security interest in the power purchase agreement pertaining to the Texico Wind Ranch. Otten's opinion letter further represented that TWP had the power and authority to execute, deliver, and perform the security agreement and all of TWP's obligations thereunder, that the security agreement was a legal, valid, and binding obligation of TWP, enforceable in California, and that the

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[1] According to Mitsubishi's verified complaint, Schroeder made a host of false representations at the December 13, 2004, meeting. Specifically, TWP did not have sufficient funds to complete the first phase of the Caprock Project because it had misappropriated a significant portion of the construction loan funds to pay overhead and other expenses of TWP, Cielo, and their subsidiaries, rather than using the funds for their prescribed purpose of paying subcontractors for work on the Caprock Project. Furthermore, according to Mitsubishi, Schroeder already knew that TWP would need more than $5.2 million to complete the Caprock Project and pay all project subcontractors.

security agreement would create a valid security interest in all of the right, title, and interest of TWP in the collateral.

Relying upon the representations of Schroeder, Otten, and others, on December 30, 2004, Mitsubishi provided the additional $5.2 million in funding to TWP through a line of credit, loan, and security agreement (the CLS Agreement). In the CLS Agreement, the parties agreed to submit to the jurisdiction of California courts.

Two months later, in February 2005, Mitsubishi learned that some of TWP's subcontractors still had not been paid. In fact, liens had been filed against the Caprock Project. Based upon a preliminary investigation and review of TWP's books and records, Mitsubishi determined that an additional $13 million (as opposed to $5.2 million) would be needed to pay all subcontractor claims against the Caprock Project.

On March 10, 2005, Otten visited Mitsubishi's offices in Newport Beach to negotiate an amendment to the CLS Agreement. During that meeting, Otten allegedly failed to disclose that Texico had not assigned its interest in the Texico PPA to TWP and that the prior representations that TWP owned this interest and had the power and authority to assign and grant Mitsubishi a security interest in the Texico PPA were false.

The result of the meeting was the first amendment to the CLS Agreement.

During the same March 10, 2005, meeting, Otten proposed a transaction in which TWP would sell a long list of assets to Cielo in exchange for a $2.2 million note and 50 percent of Cielo's substantial completion payments from a proposed 160 MW wind power project at Wildorado, Texas (the Wildorado Project). Otten represented that this transaction would assist Cielo in obtaining financing to develop the Wildorado Project. Mitsubishi agreed to this "restructuring" transaction in May 2005.

On May 1, 2005, Mitsubishi and TWP signed a second amendment to the CLS Agreement, increasing the amount available to $14.58 million. On May 11, 2005, Mitsubishi and TWP executed a third amendment to the CLS Agreement to cover the payment of additional subcontractor claims. The amount then available to TWP was increased to $18.8 million.

At some point after the CLS Agreement was signed, a new payment protocol (the second protocol) was instituted. Under the second protocol, the subcontractors would submit invoices to TWP for work performed. TWP would collect the invoices and submit payment applications to Caprock Wind, requesting that a lump sum progress payment be made to Mitsubishi. Caprock Wind would make the lump sum progress payment to Mitsubishi, at which point TWP would submit to Mitsubishi a payment application that included the subcontractors' individual invoices and other documentation proving that the expenses were legitimate. Mitsubishi would then issue a check directly to the subcontractors.

Pursuant to the second protocol, TWP would submit invoices to Mitsubishi on behalf of itself for the purpose of reimbursing TWP for money TWP spent on its overhead with respect to the Caprock Project. Since December 30, 2004, Schroeder submitted payment applications on behalf of Mitsubishi for approximately $300,000 to $500,000. For these payment applications requesting the reimbursement of TWP's overhead, Mitsubishi released funds to TWP for the majority, if not all, of the payment applications Schroeder submitted on TWP's behalf, and Schroeder expressly identified TWP as the payee with every payment application he submitted on behalf of TWP for TWP overhead.

TWP's Default

According to Mitsubishi, TWP drew down approximately $17 million under the CLS Agreement in order to fulfill its obligations on the Caprock Project. On June 30, 2005, TWP defaulted on the payment of its interest then due. Despite Mitsubishi's issuance of a demand for this payment due, TWP failed to cure the default within seven days. Consequently, on August 19, 2005, Mitsubishi declared an event of default and notified all of the defendants that all outstanding amounts for principal and accrued interest under the CLS Agreement were immediately due and payable.

Mitsubishi Files Suit in California

On February 7, 2006, Mitsubishi filed its complaint in Los Angeles Superior Court against TWP, Cielo, Texico, Schroeder, Otten, and Hornaday. The complaint alleges a

cause of action for intentional misrepresentation against both Schroeder and Otten, and also pleads a cause of action for negligent misrepresentation against Otten.

With respect to Schroeder, Mitsubishi alleges that (1) he (and others) submitted payment applications in the fall of 2004 that falsely represented that the construction loan funds used therein would be used solely to pay Caprock Project subcontractors; (2) he (and others) submitted payment applications in the fall of 2004 that falsely represented that all amounts owed by TWP to others for materials or supplies or labor performed on the Caprock Project prior to that date had been fully satisfied; (3) he (and others) falsely represented in December 2004 that TWP would not have sufficient funds to complete the first phase of the Caprock Project due to cost overruns; and (4) he (and others) falsely represented in December 2004 that $5.2 million in additional funds were needed to complete the Caprock Project.

With respect to Otten, Mitsubishi alleges that she falsely represented to Mitsubishi that TWP owned sufficient assets with which to fully secure the amount of the loan in favor of Mitsubishi and that she falsely represented that TWP had the right and authority to transfer to Mitsubishi a collateral assignment and security interest in the Texico PPA.

Mitsubishi seeks approximately $16 million compensatory damages, plus punitive damages and attorney fees.

Motions to Quash

On April 12, 2006, Schroeder and Otten moved to quash service of summons.

On May 18, 2006, the trial court granted Schroeder and Otten's motion to quash service of summons. It found that their contacts with California were insufficient to establish jurisdiction.

The complaint against Schroeder and Otten was dismissed, and Mitsubishi's timely appeal followed.

DISCUSSION

I. *Standard of Review*

"When a nonresident defendant challenges personal jurisdiction, the burden shifts to the plaintiff to demonstrate, by a preponderance of the evidence, that all necessary

jurisdictional criteria have been met. The plaintiff can meet this burden only by the presentation of competent evidence in affidavits or declarations and authenticated documentary evidence. [Citation.] Affidavits or declarations consisting primarily of vague assertions of ultimate fact rather than specific evidentiary facts are not sufficient. [Citation.] Once the plaintiff has met the burden of demonstrating facts justifying the exercise of jurisdiction, the burden shifts to the defendant to demonstrate that the exercise of jurisdiction would be unreasonable. [Citations.]

"Thus, the process is essentially an evidentiary one and the applicable standard of appellate review is the familiar substantial evidence rule. Therefore, if there is conflicting evidence presented by the parties, we are called upon to determine whether the trial court's decision is supported by substantial evidence [citations], and, in doing so, we resolve all conflicts in the relevant evidence 'against the appellant and in support of the order' [citation]. If there is no conflict in the relevant evidence, the question is one of law as to which we exercise our independent judgment. [Citation.]" (*Paneno v. Centres for Academic Programmes Abroad, Ltd.* (2004) 118 Cal.App.4th 1447, 1454 (*Paneno*).)

II. *Jurisdiction*

Pursuant to "California's long-arm statute, California courts may exercise jurisdiction on any basis not inconsistent with the Constitution of the United States. (Code Civ. Proc., § 410.10.) A state court's assertion of personal jurisdiction over a nonresident defendant who has not been served with process within the state comports with the requirements of the due process clause of the federal Constitution if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate '"traditional notions of fair play and substantial justice."'" (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444 (*Vons*), quoting *Internat. Shoe Co. v. Washington* (1945) 326 U.S. 310, 316.) In other words, the exercise of jurisdiction must be reasonable. (*Cornelison v. Chaney* (1976) 16 Cal.3d 143, 147; *Boaz v. Boyle & Co.* (1995) 40 Cal.App.4th 700, 714.)

"Traditionally, courts may exercise either general or specific personal jurisdiction over a nonresident defendant. [Citation.]" (*Paneno, supra*, 118 Cal.App.4th at p. 1455.)

General jurisdiction permits a court to exercise personal jurisdiction over a nonresident defendant when said defendant's activities are substantial or continuous and systematic, even if the cause of action is unrelated to the defendant's forum-related activities. (*Ibid*.; see also *Vons, supra*, 14 Cal.4th at pp. 445–446; *Serafini v. Superior Court* (1998) 68 Cal.App.4th 70, 78–80, quoting and relying upon *Perkins v. Benguet Mining Co.* (1952) 342 U.S. 437; *Mansour v. Superior Court* (1995) 38 Cal.App.4th 1750, 1758.) "Such a defendant's contacts with the forum are so wide-ranging that they take the place of physical presence in the forum as a basis for jurisdiction." (*Vons, supra*, at p. 446.) No question of general jurisdiction arises in the case before us. We only need to consider whether Schroeder and/or Otten can be subjected to specific jurisdiction.

"Specific jurisdiction arises when a nonresident defendant has purposefully directed his or her activities at forum residents, or has purposefully derived benefit from forum activities, or has purposefully availed himself or herself of the privilege of conducting activities within the forum, or has deliberately engaged in significant activities with a state or has created continuing obligations between himself and residents of the forum. In such cases the defendant has availed himself of the privilege of conducting business in the forum, and because his activities are shielded by the benefits and protections of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well. [Citation.]" (*Tri-West Ins. Services, Inc. v. Seguros Monterrey Aetna, S.A.* (2000) 78 Cal.App.4th 672, 677.)

Stated otherwise, specific "jurisdiction depends upon the quality and nature of [a defendant's] activity in the forum in relation to the particular cause of action. In such a situation, the cause of action must arise out of an act done or transaction consummated in the forum, or [the] defendant must perform some other act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. Thus, as the relationship of the defendant with the state seeking to exercise jurisdiction over him grows more tenuous, the scope of jurisdiction also retracts, and fairness is assured by limiting the circumstances under which the plaintiff can compel him to appear and defend. The crucial inquiry concerns

the character of [the] defendant's activity in the forum, whether the cause of action arises out of or has a substantial connection with that activity, and upon the balancing of the convenience of the parties and the interests of the state in assuming jurisdiction." (*Cornelison v. Chaney, supra*, 16 Cal.3d at p. 148, fn. omitted.)

III. *The Trial Court's Order is Reversed*

It is undisputed that Schroeder and Otten did not consent to California jurisdiction. It is also undisputed that they do not reside in California, do not own property in California, and did not execute any of the relevant agreements.[2] Those facts, however, have little bearing on whether respondents' alleged acts of wrongdoing were expressly targeted at California and at an entity that operates, at least in part, out of a California office. Other undisputed facts confirm that Schroeder and Otten expressly committed fraud in and at California and thus are subject to suit here.

First, Schroeder and Otten attended meetings in California regarding the financing of the Caprock Project. The alleged fraud occurred, in part, at those meetings. For example, on December 13, 2004, Schroeder met with Mitsubishi officials at the Newport Beach office and misled them into loaning TWP more money and later increasing TWP's line of credit. Likewise, at a meeting at Mitsubishi's Newport Beach office, Otten made a host of misrepresentations to Mitsubishi, leading Mitsubishi to unwisely agree to the first amendment to the CLS Agreement and to the later restructuring transaction.

Moreover, all communications were directed at Mitsubishi personnel in California. Specifically, according to Mitsubishi, Schroeder prepared false payment applications that he submitted directly to Mitsubishi's Newport Beach office. He also sent Mitsubishi e-mails, including a December 14, 2004, spreadsheet that purportedly detailed the $5.2 million required to complete the Caprock Project. As for Otten, she allegedly provided Mitsubishi officials in California with a false legal opinion regarding TWP's right and

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[2] As discussed at oral argument, pursuant to at least some of the agreements, the signatories thereto agreed to submit to California jurisdiction.

authority to transfer certain collateral. And, she contacted Mitsubishi in California, via telephone and e-mail, regarding the subject loan agreements.

Under these circumstances, Otten and Schroeder's contacts with California were more than fortuitous, and they should reasonably have anticipated defending a lawsuit here.

In his respondent's brief, Schroeder asserts that California was not the focal point of the alleged fraud; Mitsubishi, after all, is a Delaware corporation with its principal place of business in Florida. We disagree. Mitsubishi maintains an office in California. In fact, its wind turbine group is based in that Newport Beach, California office, and this case involves wind turbines. Schroeder directed his communications with Mitsubishi regarding the Caprock Project, a wind turbine project, to the Newport Beach, California office. And, as set forth above, he even attended a meeting here regarding the Caprock Project. It follows that California was the focal point of his alleged fraud.

The fact that the subject project concerned a New Mexico wind farm and not a project being built in California also does not alter our analysis. The bottom line is that Schroeder allegedly committed fraud, via e-mail and in person, in California.

Otten's challenge to the vagueness of Mitsubishi's allegations[3] does not compel us to affirm. As counsel somewhat conceded during oral argument, her complaint regarding the adequacy of Mitsubishi's pleading should be addressed in some other sort of motion, such as a demurrer, not by way of a motion to quash for lack of minimum contacts.

In urging us to affirm, both Otten and Schroeder argue that they gained no personal benefit as a result of the alleged fraud; the only person or entity who benefited

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3 At oral argument, Otten's counsel cited *Regents of University of New Mexico v. Superior Court* (1975) 52 Cal.App.3d 964, 970, fn. 7 (*Regents*), and contended that Otten should not be dragged to defend this lawsuit in California based upon Mitsubishi's mere assertion of fraud. Unlike the situation in *Regents*, Mitsubishi's verified complaint is not based upon information and belief and does make a prima facie showing that there may be substantive merit to the claims alleged in the operative pleading. That being said, of course, we express no opinion as to the merits of Mitsubishi's claims against any of the defendants.

was TWP and/or Hornaday. The law does not require Otten and Schroeder to have personally gained a benefit in order to be subject to specific personal jurisdiction. Rather, because they personally directed their activities at a plaintiff with a California office and at California itself, they reasonably could have foreseen being haled into court here. (See, e.g., *Snowney v. Harrah's Entertainment, Inc.* (2005) 35 Cal.4th 1054, 1063.)

At oral argument, Schroeder's counsel reiterated his contention that *Pavlovich v. Superior Court* (2002) 29 Cal.4th 262 (*Pavlovich*) compels affirmance. We are not convinced. In *Pavlovich*, our Supreme Court considered whether California courts could properly assert jurisdiction over an individual based solely on the posting of a source code on an Internet Web site. (*Id*. at p. 268.) It concluded that they could not; the defendant's posting on a passive Web site could not subject him to jurisdiction in California. (*Id*. at p. 274.) Moreover, the defendant's knowledge that his alleged tortious conduct could harm industries in California, while relevant to any determination of jurisdiction, could not *alone* establish "express aiming" at California to support the assertion of jurisdiction. (*Id*. at p. 278.)

Pavlovich is readily distinguishable. As set forth above, Schroeder allegedly did far more than merely post items on a passive Web site. Not only did he deliberately send e-mails to Mitsubishi officials in California, but he also came to California and participated in a meeting that induced Mitsubishi to lend TWP more money.

Furthermore, the exercise of jurisdiction over Schroeder and Otten is reasonable. Each has traveled to California in connection with the events giving rise to this lawsuit. And, California has a strong interest in providing a forum to protect a corporation with a full service office here from fraud, particularly given that the fraud occurred (at least in part) in California. In addition, much evidence, including documents and witnesses, is located here, presumably in Mitsubishi's office.

Finally, the considerations of judicial efficiency weigh in favor of the exercise of jurisdiction over respondents. This litigation is complex and involves numerous parties. Dividing the litigation between two states would only serve to create wasteful duplication and create the risk of inconsistent rulings. Because California is already the forum for

many of the litigants, judicial efficiency and economy bolster our conclusion to reverse the trial court's order and compel Otten and Schroeder to defend Mitsubishi's claims here. (*Vons, supra*, 14 Cal.4th at p. 477.)

DISPOSITION

The order of the trial court is reversed. Mitsubishi is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ